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No. 505.

Brief of Hubbard & Maury for Appellees
v. Merritt
Filed Jan 31, 1898

Supreme Court of the United States.

OCTOBER TERM, 1897.

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No. 505.

JAMES P. MERRITT AND HENRY P. MERRITT,
APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON MOTION TO DISMISS.

THOS. H. HUBBARD,
WM. A. MAURY,
GEO. N. WILLIAMS,
ROBERT Y. HAYNE,
E. S. PILLSBURY,
Counsel for Appellees.

WASHINGTON, D. C., 1505 *Pa. Ave.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

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JAMES P. MERRITT AND HENRY P. MERRITT,
APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION TO DISMISS.

And now come the Appellees by their Counsel and move the Court to dismiss the said Appeal for want of jurisdiction to entertain the same, for the reasons stated in the following brief.

THOS. H. HUBBARD,
WM. A. MAURY,
GEO. N. WILLIAMS,
ROBERT Y. HAYNE,
E. S. PILLSBURY,
Counsel for Appellees.

To Messrs. BRITTON & GRAY, *Washington, D. C.,*
Counsel for Appellants:

You will please to take notice that at 12 o'clock M., on Monday, the thirty-first day of January, 1898, or as soon thereafter as Counsel can be heard, we shall move the said Court to dismiss the appeal in the cause above entitled, for the reasons stated in the following brief.

THOS. H. HUBBARD,
WM. A. MAURY,
GEO. N. WILLIAMS,
ROBERT Y. HAYNE,
E. S. PILLSBURY,
Counsel for Appellees.

1505 PENN. AVE.,
WASHINGTON, D. C., *January* 7, 1898.

BRIEF IN SUPPORT OF THE MOTION TO DISMISS.

This is a bill in Equity filed in the Circuit Court of the United States for the Northern District of California by the President and Trustees of Bowdoin College and others against James P. Merritt, F. A. Merritt, Thomas Prather, William E. Dargie, John A. Stanly, Harry P. Merritt, George W. Reed, Administrator &c. of Catharine M. Garcelon and O. C. Miller, Executor of Stephen W. Purington.

This case was several times before the Circuit Court, and

the proceedings on each of those occasions will be found, respectively, in 54 Federal Reporter, 55; 59 *ibid.*, 6; 63 *ibid.*, 213; 75 *ibid.*, 480. In 54 Federal Reporter, pp. 56–58, is to be found a clear and terse statement of the bill in this case, by Judge Hawley.

The Complainants are all beneficiaries under a certain deed of trust made by the late Catharine M. Garcelon to John A. Stanly and Stephen W. Purington, upon certain trusts therein limited, to which it is not necessary to refer more particularly for the purpose of this motion.

The property covered by the trust deed is of great value, and the prayer of the bill is that a decree may be entered giving repose and quiet to the title of the trustees and beneficiaries under the deed from certain pretensed claims of the defendants J. P. Merritt and F. A. Merritt, as heirs-at-law and next of kin of the said Catharine M. Garcelon, who publicly threaten to carry their pretensed claims into court, and who, for the purpose of hampering the said trustees and preventing them from disposing of property in furtherance of the trusts and intents of the said deed, are industriously engaged in slandering the title of the trustees and beneficiaries claiming under said deed, and giving out to the public that, by virtue of a certain champertous agreement they had entered into, or were about to enter into, with men of capital and influence, they had secured, or were about to secure, ample means for defraying the expenses of assailing the validity of the said deed at law, and that they had, at the same time, secured indemnity, from the same source, against forfeiture of certain property settled on them by the said Catharine M. Garcelon by a certain other deed containing certain covenants and conditions made and entered into

between her and the said Merritts for the express purpose of placing the said Merritts under an obligation not to question the validity of any future disposition which the said Catharine M. Garcelon should afterwards see fit to make, and which she, in fact, did afterwards make, by the said deed of trust.

The bill avers that this conduct of the said defendants, J. P. Merritt and F. A. Merritt, is in open violation of their express covenants and agreements with the said Catharine M. Garcelon, as aforesaid, and that, unless such conduct and threatened legal proceedings can be arrested by injunction, the large amount of unproductive real estate embraced in said deed cannot be sold for the purposes of the said trusts, but must remain a burden, indefinitely, on the said trusts and seriously impair their value.

The bill further avers that Complainants have requested the trustees Stanly and Purington to bring suit to quiet the title derived from the said trust deed, but that they have refused to comply with said request.

The Circuit Court had jurisdiction of the bill on the ground of the diverse citizenship of the Complainants and Respondents, the former being citizens of other states than California, and the latter being citizens of California.

Nevertheless, the jurisdiction of the Circuit Court was denied and controverted by the defendants, the Merritts, on the ground that the suit was promoted by their codefendants, the trustees, Stanly and Purington, and was collusive and a fraud on the jurisdiction of the Court, and should be dismissed under Section 5 of the Act of March 3, 1875.

The jurisdictional objection was raised by demurrer (54

Fed. Rep., 55), and then by plea (63 Fed. Rep., 213), and, also, by motion and answer, but was overruled in each instance.

The defendants, the Merritts, then sought to overthrow the trust deed on the grounds of illegality and of fraud and undue influence pretended to have been exerted upon Catharine M. Garcelon, the grantor, by the defendants, John A. Stanly and Stephen W. Purington, trustees in the deed.

The cause came on for final hearing on the pleadings and evidence, and, after elaborate argument, a decree was entered, on June 5, 1896, granting the relief prayed for in the bill. (75 Fed. Rep., 480.)

From this decree a direct appeal to this Court was prayed for by the defendants James P. Merritt and Henry P. Merritt, after severance from the other defendants, and was allowed, and the cause is now on the docket of this Court.

The record contains 35 assignments of error, of which the first 25, only, can be said to give any color of jurisdiction to this Court. But, for the convenience of the Court, we give all the assignments of error:

1. Because this suit involves the construction of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true construction of said provision excluded this suit from the judicial power of the United States granted and defined by said provision and lodged in said Circuit Court; and the said Circuit Court after being duly requested by said defendants, and by each of them respectively, so to construe said provision as to exclude this suit from the judicial power of the United States granted and defined by said Constitution, lodged in said Circuit Court, erroneously denied said request.

2. Because this suit involved the application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true application of the said provision excluded this suit from the judicial power of the

United States lodged in said Circuit Court, and the said Circuit Court, after being duly requested by said defendants, and by each of them respectively, so to apply said provision as to exclude this suit from the judicial power of the United States granted and defined by said provision and lodged in said Circuit Court, erroneously denied said request.

3. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true construction and application of the said provision excluded this suit from the judicial power of the United States lodged in said Circuit Court, and the said Circuit Court, after being duly requested by said defendants, and by each of them respectively, so to construe and apply said provision as to exclude this suit from the judicial power of the United States, granted and defined by said provision, and lodged in said Circuit Court, erroneously denied said request.

4. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true construction and application of said provision excluded this suit from the judicial power of the United States, and the said defendant James P. Merritt in and by his plea filed in said suit, duly showed to said Circuit Court that the said true construction and application of said provision excluded this suit from the judicial power of the United States, and duly requested said Circuit Court so to construe and apply said provision, and the said Circuit Court erroneously overruled said plea and denied said request.

5. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true construction and application of said provision excluded this suit from the judicial power of the United States, and the said defendants [*sic*] James P. Merritt in and by his answer filed in said suit, duly showed to said Circuit Court that the said true construction and application of said provision excluded this suit from the judicial power of the United States, and duly requested said Circuit Court so to construe and apply said provision, and the said Circuit Court erroneously overruled said answer and denied said request.

6. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to

controversies between citizens of different states, and the true construction and application of said provision excluded this suit from the judicial power of the United States, and the said defendant James P. Merritt in and by his motion, in writing, filed in said suit, duly showed to said Circuit Court that the said true construction and application of said provision excluded this suit from the judicial power of the United States, and duly requested said Circuit Court so to construe and apply said provision, and the said Circuit Court erroneously overruled said motion, in writing, and denied said request.

7. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, the true construction and application of said provision excluded this suit from the judicial power of the United States, and the said defendant Harry P. Merritt in and by his motion, in writing, filed in said suit, duly showed to said Circuit Court that the said true construction and application of said provision excluded this suit from the judicial power of the United States, and duly requested said Circuit Court so to construe and apply said provision, and the said Circuit Court erroneously overruled said motion, in writing, and denied said request.

8. Because this suit involves the construction and application of that provision in the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of complainants showed that this suit was not, at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power, and from the jurisdiction of said Circuit Court (all of which appeared by said bill), and the said James P. Merritt by his demurrer to said bill duly claimed the benefit and protection of said provision of the Constitution, and duly requested and claimed such construction and application thereof as to exclude this suit from the said judicial power and from the jurisdiction of the said Circuit Court, and said Circuit Court erroneously overruled the demurrer and erroneously denied said claim and request.

9. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants (and also all the pleadings in the suit) showed

that this suit was not, at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power, and from the jurisdiction of the said Circuit Court (all of which appeared in said bill and in all the pleadings in the suit and in the evidence,) and the said James P. Merritt by his plea duly claimed the benefit and protection of said provision of the Constitution and duly requested and claimed such construction and application thereof as to exclude this suit from the said judicial power, and from the jurisdiction of said Circuit Court, and said Circuit Court erroneously overruled said plea and denied said claim and request.

10. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants, (and also all the pleadings in the suit) showed that this suit was not, at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction of said provision of the Constitution excluded this suit from the said judicial power and from the jurisdiction of said Circuit Court (all of which appeared in said bill and in the pleadings in the suit and in the evidence), and the said James P. Merritt by his motion, in writing, duly claimed, the benefit and protection of said provision of the Constitution, and duly requested and claimed such construction and application thereof, as to exclude this suit from the said judicial power and from the jurisdiction of said Circuit Court, and said Circuit Court erroneously overruled said motion and denied said claim and request.

11. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants (and also all the pleadings in the suit) showed that this suit was not, at any time, a controversy, and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power and from the jurisdiction of the said Circuit Court (all of which appeared in said bill and in all the pleadings in the suit and in the evidence), and the said James P. Merritt by his answer duly claimed the benefit and protection of the said provision of the Constitution, and duly requested and claimed such a construction and application thereof as to exclude this suit from the said judicial power and from the jurisdiction of the said Circuit Court, and

said Circuit Court erroneously overruled said answer and denied said claim and request.

12. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants showed that this suit was not, at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power (all of which appeared by said bill) and the said Harry P. Merritt by his demurrer to said bill, duly claimed the benefit and protection of said provision of the Constitution, and duly requested and claimed such construction and application thereof as to exclude this suit from the said judicial power, and from the jurisdiction of said Circuit Court, and said Circuit Court erroneously overruled this demurrer and erroneously denied said claim and request.

13. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants (and also all the pleadings in the suit) showed that this suit was not, at any time, a controversy, and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power and from the jurisdiction of the said Circuit Court (all of which appears in said bill and in all the pleadings in the suit and in the evidence), and the said Harry P. Merritt, by his answer, duly claimed the benefit and protection of the said provision of the Constitution, and duly requested and claimed such a construction and application thereof as to exclude this suit from the said judicial power and from the jurisdiction of the said Circuit Court, and the said Circuit Court erroneously overruled said answer and denied said claim and request.

14. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants (and also all the pleadings in the suit) showed that this was not at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction of said provision of the Constitution excluded this suit from the said judicial power and from the jurisdiction of

said Circuit Court (all of which appeared in said bill and in all the pleadings in the suit and in the evidence), and the said Harry P. Merritt by his motion, in writing, duly claimed the benefit and protection of the said provision of the Constitution and duly requested and claimed such a construction and application thereof as to exclude this suit from the said judicial power and from the jurisdiction of the said Circuit Court, and said Circuit Court erroneously overruled said motion and denied said claim and request.

15. Because this bill showed that this suit is not a controversy and does not involve a controversy between citizens of different states, and was and is not within the jurisdiction of said Circuit Court.

16. Because the bill showed that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

17. Because the pleadings showed that this suit is not a controversy and does not involve a controversy between citizens of different states, and is not within the jurisdiction of said Circuit Court.

18. Because the pleadings showed that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

19. Because the pleadings and the evidence showed that, for the purpose of creating a case cognizable by said Circuit Court under the Act of the Congress of the United States, enacted March 3, 1875, entitled "An Act to Determine the Jurisdiction of Circuit Courts of the United States and to Regulate the Removal of Causes from State Courts, and for Other Purposes," and the Acts of Congress amendatory thereof, the parties to this suit have been improperly joined as defendants as follows, namely: John A. Stanly and Stephen W. Purington, as trustees under and by virtue of the deed of trust averred in said bill of complaint to have been made by the late Catharine M. Garcelon, and bearing date April 21, 1891, have been improperly joined as defendants, but were really and truthfully, plaintiffs, and should have been and should be joined as plaintiffs; that the said Stephen W. Purington, as such trustee, was really a plaintiff in this suit from its commencement until his death; that said John A. Stanly, as such trustee, has been ever since the beginning of this suit, and now is a plaintiff in this suit; that said John A. Stanly was at the time of the commencement of this suit, and ever since has been, a citizen of the State of California and of the same state as said defendant James P. Merritt; that said Stephen W. Purington was, until his death, a citizen of the State of California; and that this suit does not really and sub-

stantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

20. Because the pleadings and evidence showed that, for the purpose of creating a case cognizable by said Circuit Court under said Acts of Congress, parties to the suit have been collusively joined as follows, namely, John A. Stanly and Stephen W. Purington, as trustees, as aforesaid, have been collusively joined as defendants, but at the time of the commencement of this suit and ever thereafter were really and truthfully plaintiffs; that Stephen W. Purington, as such trustee, was really a plaintiff in this suit from its commencement until his death; that said John A. Stanly, as such trustee, has ever since the commencement of this suit been, and now is, really a plaintiff; that said Stephen W. Purington was, until his death, a citizen of the State of California, and that John A. Stanly, at the time of the commencement of this suit, was, and ever since has been and now is a plaintiff in this suit; both said Stephen W. Purington and John A. Stanly being citizens of the same state as said defendant James P. Merritt.

21. Because the pleadings and the evidence showed that this suit was fraudulently devised and procured to be instituted by said John A. Stanly, as a fraud upon said Circuit Court and upon the jurisdiction thereof, and that, by the fraud and collusion of the said John A. Stanly, said Stephen W. Purington and Complainants, the President and Trustees of Bowdoin College, this suit was by them as complainants, commenced, and was by them as co-complainants, collusively and fraudulently prosecuted until the death of Stephen W. Purington, and ever since the death of Stephen W. Purington by said John A. Stanly and the President and Trustees of Bowdoin College; that said John A. Stanly and Stephen W. Purington, as Trustees, as aforesaid, have been by the fraud and collusion of said John A. Stanly and Stephen W. Purington and the President and Trustees of Bowdoin College fraudulently, collusively and falsely named and feigned to be defendants in this suit, for the purpose of creating a case cognizable by the said Circuit Court under said Acts of Congress.

22. Because the pleadings and the evidence showed that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

23. Because the pleadings and the evidence showed that this suit is a controversy between the defendants, John A. Stanly and Stephen W. Purington (until his death) as Trustees, as aforesaid, in the names of the persons named in said bill of complaint as complaints [sic], on the one side, and said defendant James P. Merritt, as well as other defendants, on the other side; and that said John A. Stanly and said Stephen W. Purington, now deceased (until his

death) and said defendant James P. Merritt are and at all times were citizens of the State of California; that the suit is a controversy between citizens of the same state and that said Circuit Court has no jurisdiction of the controversy.

24. Because the pleadings and the evidence showed that John A. Stanly, as Trustee under and by virtue of said deed of trust, named in the bill as a defendant is really a complainant, and that his interest is identical with complainants; and that his duty is entirely to them, and that all of his acts and those of said Stephen W. Purington, his former co-trustee (now deceased) have been co-operative on the side of the complainants, and that he and his said co-trustee affected and feigned to decline bringing suit in their own name for the purpose of inducing complainants, The President and Trustees of Bowdoin College, and the other persons named in said bill of complaint as complainants, to bring suit in said Circuit Court and not in a Superior Court of the State of California, and to make said Stanly and Purington, as Trustees, as aforesaid, parties defendant on the face of said bill of complaint, and advised and induced, and procured this suit to be brought and maintained; that said Stanly and Purington, as Trustees, as aforesaid, the said The President and Trustees of Bowdoin College, improperly and collusively and fraudulently and without authority therefor, inserted as complainants the names of all the other nominal complainants in said bill of complaint, only because said other nominal complainants were citizens of other states than the State of California, all for the purpose of creating a case cognizable by said Circuit Court.

25. Because the pleadings and the evidence showed that this suit has been collusively imposed upon the jurisdiction of said Circuit Court by the persons named in said bill of complaint as complainants, and by said John A. Stanly, as Trustee, as aforesaid.

26. Because the evidence showed that the conveyances in trust alleged in complainants' bill to have been made by Catharine M. Garcelon to John A. Stanly and Stephen W. Purington, in trust, dated April 21, 1891, were a testamentary disposition of property by said Catharine M. Garcelon, in trust for charitable uses and collectively exceeding $\frac{1}{3}$ of the estate of said Catharine M. Garcelon, and were and are invalid and void by virtue of Sec. 1313 of the Civil Code of the State of California.

27. Because the evidence showed that the said conveyances being in fact testamentary as aforesaid, and a conveyance of more than $\frac{1}{3}$ of the estate of said Catharine M. Garcelon in trust for charitable uses, were a fraudulent shift and device to evade in form only, but to violate in truth and substance and effect the provisions of Sec. 1313 of the Civil Code of the State of California.

28. Because the evidence showed that the said conveyances were obtained from the said Catharine M. Garcelon by the said John A. Stanly and Stephen W. Purington fraudulently and by undue influence exerted by them upon the said Catharine M. Garcelon; that the said Catharine M. Garcelon was then an aged, sickly and feeble woman, and that said John A. Stanly then held in respect to her the confidential relation of being her attorney and counsellor-at-law and legal adviser, and the said Stephen W. Purington then held in respect to her a confidential relation, being then her confidential agent and business manager; that the said John A. Stanly and Stephen W. Purington were then vigorous persons, mentally and physically, and obtained the said conveyances from the said Catharine M. Garcelon by means of their influence over her, and resulting from the holding in respect to her of said confidential relations; that the said Catharine M. Garcelon had no independent advice in respect to said conveyances, or either of them, and made such conveyances solely upon the advice and at the solicitation of said John A. Stanly and Stephen W. Purington, and for the benefit of said John A. Stanly and Stephen W. Purington, and for the benefit of said John A. Stanly and Stephen W. Purington, as trustees, as alleged in complainants' bill, and for the benefit of themselves respectively; that said conveyances were obtained from said Catharine M. Garcelon without any consideration whatever, and embraced almost the entire bulk of her estate.

29. Because the said Circuit Court erred in decreeing that the trust conveyance dated April 21, 1891, alleged in the bill of complainants, were not a violation of Sec. 1313 of the Civil Code of the State of California.

30. Because the said Circuit Court erred in decreeing that the trust conveyances dated April 21, 1891, and alleged in the bill of complainants, were not a bequest and devise by Catharine M. Garcelon of more than ½ of her estate to persons in trust for charitable uses (said Catharine M. Garcelon dying and leaving legal heirs) in violation of Sec. 1313 of the Civil Code of the State of California.

31. Because the said Circuit Court erred in decreeing that the said trust conveyances dated April 21, 1891, and alleged in the bill of complainants, were not obtained from Catharine M. Garcelon by John A. Stanly and Stephen W. Purington, by means of undue influence exercised by them upon her.

32. Because the said Circuit Court erred in decreeing that the trust conveyances dated April 21, 1891, and alleged in the bill of complainants, were not obtained from Catharine M. Garcelon by John A. Stanly and Stephen W. Purington by means of fraud.

33. Because the said Circuit Court erred in decreeing that the

trust conveyances dated April 21, 1891, and alleged in complainants' bill, were not obtained from Catharine M. Garcelon by John A. Stanly and Stephen W. Purington by the use by them of confidence imposed in them by her and of authority held over her by them for the purpose of obtaining an unfair advantage over her.

34. Because the said Circuit Court erred in decreeing that the trust conveyance dated April 21, 1891, alleged in complainants' bill, were not obtained from Catharine M. Garcelon by John A. Stanly and Stephen W. Purington, by taking an unfair advantage over her weakness of mind.

35. Because the said Circuit Court erred in decreeing that said trust conveyances were delivered by said Catharine M. Garcelon to John A. Stanly and Stephen W. Purington, the grantees named therein.

Wherefore, the said Defendant James P. Merritt, and also the said Defendant Harry P. Merritt do each pray that the said judgment or decree, be reversed, and that the said Circuit Court be directed to enter a decree dismissing this said suit, and awarding to each of the defendants respectively the recovery of his costs.

The record, which is of great volume, has not yet been printed by appellants, but the above presentation of the case is sufficient for the purpose of the present motion. Indeed, as the Court will perceive, the statements of fact contained in several of the assignments of error are alone sufficient to support this motion to dismiss.

ARGUMENT.

The ground on which the jurisdiction of this Court is invoked is, that the decree appealed from involves the construction and application of the provision of Article 3, Section 2, of the Constitution of the United States, which extends the judicial power "*to controversies between citizens of different States.*"

It is assigned for error, substantially, that this suit was

really the suit of the trustees, Stanly and Purington, and was in fact and law, a controversy between them and the other defendants, and that all the parties to that controversy are citizens of the same state, California; and that the alleged refusal of the trustees to sue in their own names was merely feigned, collusive, and fraudulent, to enable the Complainants to sue in the Federal Court, they all being citizens of states other than the State of California; and that the said suit was in fact brought by the said trustees, and has been carried on by them, and is being carried on by the survivor of them, John A. Stanly.

It may be repeated that these objections to the jurisdiction of the Circuit Court were overruled, in every particular, by the Court, on full consideration and after elaborate argument. (63 Fed. Rep., 213.)

The jurisdiction of this Court is invoked, by direct appeal from the Circuit Court, on the ground, already stated, that the cause involves the construction or application of the aforesaid provision of the Constitution of the United States, in other words that it is a case in equity arising under the Constitution. There is no other ground advanced on which it is claimed that jurisdiction of this appeal can be sustained. In none of the assignments of error is it pretended that there is other support for this appeal.

A case "in law or equity" may be said to arise under the Constitution whenever its correct decision depends on the construction of that instrument. (Cohens *vs.* Virginia, 6 Wh., 264, 379.)

That the denial of the jurisdiction of the Circuit Court did not, in any way, involve the construction or application of the Constitution is very clear. That Court does not

derive jurisdiction from the Constitution, but from Section 1 of the Act of March 3, 1887, c. 273, (24 Stat., 552), as corrected by the Act of August 13, 1888, c. 866, (25 Stat., 433). This Court is the only federal court that receives its jurisdiction directly from the Constitution, and which is named in and established by that instrument. All other tribunals of the United States are the creations of Congress, under the power "to constitute tribunals inferior to the Supreme Court," and are vested with so much of "the judicial power," only, as Congress, in its good pleasure, has seen fit to bestow on them.

When the appellants drew in question the authority of the Circuit Court to take jurisdiction of the cause as a controversy between citizens of different states, it was not the construction or application of the Constitution, or even of the Act of March 3, 1887, that was involved, but the construction and application of the *facts* out of which the question arose, viewed in the light of the local law of California.

The decision of that question called for the following inquiries: Whether the complainants had any interest in the property named in the bill to support this suit, in view of the contention that the trust deed was invalid under the State law, or whether, if valid, the *trustees only* had the right under that law, to file this bill, and, if not, whether the refusal of the trustees to file the bill, and the request to them to do so by the beneficiaries under the trust deed, were in good faith or simply collusive and for the purpose of attracting the jurisdiction of the federal Court and of avoiding the jurisdiction of the proper State Court.

The matters of law involved in these inquiries were all decided under the law of California, without reference to the

Constitution or the Act of Congress, the provisions of both with reference "to controversies between citizens of different states" being too plain to admit of being drawn in question without offering an affront to the intelligence of the Court, for, manifestly, if there was, in good faith, a controversy, under the law of California, between the appellees and the appellants that controversy was, necessarily, within the provision of the Act of Congress giving the Circuit Court jurisdiction over "controversies between citizens of different states."

But, if any federal law was in question in the Court below, it was *not* the Constitution. The jurisdictional objection raised by appellants could not have involved that instrument, unless the objection necessarily carried with it a challenge of the constitutionality of the Act of March 3, 1887, conferring jurisdiction on the Circuit Court, which is not pretended, for then every case involving the interpretation of an act of Congress would become a case in which the constitutionality of some law of the United States is drawn in question, within the meaning of Section 5, of the Act of March 3, 1891, giving a direct appeal in such cases, which is plainly absurd.

It follows, that if the construction of any federal law was in question in the Court below, it must have been that of the Act of March 3, 1887. It is *from Congress* and not from the Constitution, that the Circuit Courts derive jurisdiction to determine controversaries "between citizens of different states." This has been held, again and again, by this Court. (Sheldon *vs.* Still, 8 How., 441, 448; The Assessors *vs.* Osbornes, 9 Wall., 567, 575; Case of the Sewing Machine

Companies, 18 Wall., 553, 577; Holmes *vs.* Goldsmith, 147 U. S., 150, 157, 158, 159.)

In the case of the Sewing Machine Companies (*supra*) the Court say:

> Congress, it may be conceded, may confer such jurisdiction upon the Circuit Courts as it may see fit, within the scope of the judicial power of the Constitution, not vested in the Supreme Court, but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, *it follows that inasmuch as they are created by an act of Congress it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing that end.* Federal judicial power, beyond all doubt, has its *origin* in the Constitution, but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be the work of the Congress (pp. 577, 578).

This doctrine is referred to by this Court in Holmes *vs.* Goldsmith (*supra*) as having remained "*unchallenged*" and as having been "*assumed for law in numerous cases.*"

Unless, therefore, this Court should be minded to recede from this long-established doctrine, it follows, inevitably, that this appeal must be dismissed for want of jurisdiction.

THOS. H. HUBBARD,
WM. A. MAURY,
GEO. N. WILLIAMS,
ROBERT Y. HAYNE,
E. S. PILLSBURY,
Counsel for Appellees.

WASHINGTON, D. C., 1505 *Pa. Ave.*

ADDENDUM.

Supposing, for the sake of argument, that the objection, taken by appellants to the jurisdiction of the Circuit Court, brought in issue "the construction or application" of the provision of the Constitution which extends the judicial power of the United States "to controversies between citizens of different States;" as a consequence, it, also, brought the suit under the category of a "*case in which the jurisdiction of the court is in issue,*" in the sense of section 5 of the act of March 3, 1891, c. 517 (26 Stat. 826), subjecting it to the requirement of said section that "*the question of jurisdiction alone shall be certified*" to this Court, as the condition of its taking cognizance of such a case on error or appeal.

It would be a strange interpretation of this language of section 5, to hold that a jurisdictional objection is withdrawn from its operation whenever it involves "the construction or application of the Constitution," as if it were, for that reason, any the less a "question of jurisdiction," in the sense of the act.

If this reasoning is correct, we are brought back again to the very question raised and decided by this Court, on a former appeal, in this case, on the motion of the present appellees to dismiss that appeal for want of jurisdiction. The question, then raised, was whether the question of jurisdiction was certified to this Court by the Circuit Court as required by section 5 of the act of March 3, 1891, and this

Court held, that the question was not so certified (167 U. S.), and so dismissed the appeal.

The question of the jurisdiction of this Court to entertain the former appeal in this case, having been decided adversely to the appeal, cannot be stirred again, on this appeal. It is *res judicata*, and there seems to be no alternative to the dismissal of the present appeal.

The contention set up in some of the assignments of error that "the construction and application" of the above-mentioned provision of the Constitution was involved in the case, below, is a mere *afterthought.*

In the court below, the whole contest was, as to whether *the facts of the case* showed "a controversy between citizens of different States" or merely a controversy between citizens of the same State. As has been already stated, that controversy was about *the meaning of the facts*, and not about the meaning of the Constitution, which, in the particular mentioned, is not susceptible of misconstruction or doubt.

But the case of Muse *vs.* Arlington Hotel Co. (168 U. S.) places it beyond doubt, that the jurisdictional objection in this case does not involve a question arising under the above-mentioned provision of the Constitution.

In that case, it was necessary for appellant to maintain that the bill presented a federal question, and the Chief Justice, in his opinion against that contention, takes occasion to say:

> "The jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship and *not on the ground* that the case arose 'under the Constitution or laws of the United States or treaties made, or which shall be made under that authority.'" "And it is settled," he proceeds, "that in order to give the Circuit Court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim."

This seems conclusive of the question on this motion; for if the reliance of a plaintiff on the diversity of citizenship between himself and the defendant, as the basis of jurisdiction of his case, does not present a question under the Constitution, how is it possible that the defendant's traverse of the averment of diverse citizenship can make such a question?

The following remark of the Chief Justice in the case cited is equally applicable here:

> "If this case had been taken to the Circuit Court of Appeals, the decision of that court would have been final under the 6th section of the statute, and it might well be concluded that therefore the writ of error would not lie under the 5th section."

Again, if this appeal is sustainable, on the ground that it involves "the construction or application" of the Constitution, then will the wisdom and usefulness of the provision of Section 6 of the act of March 3, 1891, making final "the judgments or decrees of the Circuit Courts of Appeals" "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States," be, in large measure, defeated.

This case, being one where jurisdiction "*is dependent entirely*" on the diverse citizenship of the parties, cannot be entertained by this Court without trenching on the jurisdiction of the Circuit Courts of Appeals. The fifth and sixth sections of the act should, however, be construed so as to harmonize, and so as to repress the mischief of the old law, namely, the burdening of the docket of this Court with controversies between citizens of different States, to the prejudice of its jurisdiction as the final expositor of the Constitution, laws, and treaties of the United States.

Office Supreme Court U. S.
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No. 505.

Reply Brf. of Hubbard, Maury

Supreme Court of the United States.

Hayne & Pillsbury for Appellees

OCTOBER TERM, 1897.

Filed Feb. 5, 1898.

No. 505.

JAMES P. MERRITT AND HENRY P. MERRITT,
APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

ON A MOTION TO DISMISS.

BRIEF OF APPELLEES IN REPLY.

THOS. H. HUBBARD,
WM. A. MAURY,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2-5-'98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 505.

JAMES P. MERRITT AND HENRY P. MERRITT,
APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

ON A MOTION TO DISMISS.

BRIEF OF APPELLEES IN REPLY.

In so far as appellants' brief purports to answer the brief in support of the motion, very little seems to be called for from the appellees, by way of reply.

The appellants having failed to show that the constitutionality of the provision of section 1 of the act of March

3, 1887, c. 273 (24 Stat., 552), as corrected by the act of August 13, 1888, c. 866 (25 Stat., 433), conferring original cognizance on the Circuit Courts of all suits "in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid," was drawn in question, it follows, inevitably, that the objection to the jurisdiction of the Circuit Court, on the ground that the suit is a controversy between citizens of the same State, involves no question arising under the Constitution of the United States. Conceding all that is stated in the assignments of error, and we need go no further, it is plain that no question arising under the Constitution could have been in issue in the court below, for it is little short of absurd to say that such a question would not have been covered by an assignment of error.

If, however, for any reason, a question thus in issue was omitted from the assignments of error, then it lay on the appellees to show, by the record, that such question was actually in issue. The burden was on them, and they having failed to take it up, the inference from the errors assigned stands confessed.

There is enough conceded in the opposite brief to show that the positions taken in the brief of appellees are well founded, nor is it pretended that the assignments of error are not correctly presented in the latter brief.

But to what end should the record, or any part thereof, be printed, for the purposes of this motion, in view of the opinion of Judge McKenna, disposing of the jurisdictional objections in the court below? This opinion is a part of the record, and is also reported in the Federal Reporter (Vol-

ume 63, p. 213), and contains every fact bearing on the questions of jurisdiction raised in the Circuit Court. This opinion is, also, cited in our original brief (p. 15).

But it is said, without a particle of support in the assignments of error, that appellants were deprived of the "protection" given by the 10th Amendment of the Constitution, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

What "protection" appellants could have derived from this declaration of a principle of constitutional interpretation is not evident, by any means.

The point made in the brief, on this head, is as follows:

> The record will further show that appellant, Henry P. Merritt, was not brought into the Circuit Court or made a party to this suit until he had begun an action in the State Superior Court, and then only for the purpose of enjoining such action. His right to maintain that action is secured by the Tenth Amendment of the Federal Constitution. He invoked in vain in the Court below both the "construction or application" of Article III, and the protection given by the Tenth Amendment (pp. 14, 15).

This point is completely exploded by the opinion of Judge McKenna, before whom was heard the application of appellees, complainants below, for leave to file a supplemental bill making the said Henry P. Merritt a party defendant, and for an injunction to restrain the prosecution of an action commenced by him in the Superior Court of Alameda County, California.

The opinion, which is contained in the record, and also reported in the Federal Reporter (Vol. 59, p. 6), states, that the objection to filing the supplemental bill turned on sec-

tion 720, Revised Statutes, and makes no reference, whatever, to the Constitution.

The learned judge thus disposes of the grounds of opposition to filing the supplemental bill:

> The object of the supplemental bill is to make Harry P. Merritt a party defendant in this action, and enjoin him from the further prosecution of said suit in the State court. But it is urged by his counsel that his cause of action is independent of that of the other Merritt, though it may require the decision of the same questions, and that an injunction restraining him is prohibited by section 720 of the Revised Statutes. It is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." In Sharon *vs.* Terry, 36 Fed. 265, this section was held by Judges Field, Sawyer, and Sabin not to apply, where the Federal court has first obtained jurisdiction. Justice Field, delivering the opinion of the court, said, "In such cases the Federal court may restrain all proceedings in a State court which would have the effect of defeating or impairing its jurisdiction." In support of this the learned justice cited Fisk *vs.* Railroad Co., 10 Blatchf. 520; Wagner *vs.* Drake, 31 Fed. 851; French *vs.* Hay, 22 Wall. 250; Dietzsch *vs.* Huidekoper, 103 U. S. 494. The suit of complainants in this court was prior in time to Merritt's suit in the State court; and it is very clear, if he should succeed in having a receiver appointed of the property, the jurisdiction of this court would be very much embarrassed, if not defeated or impaired. If, therefore, this court had jurisdiction of said Merritt at the time he commenced his suit, it can and ought to enjoin its further prosecution.
>
> When a court obtains jurisdiction of a defendant is clear. It is by service of process upon him, or his voluntary appearance. The appearance of the plaintiff is always voluntary. He invokes jurisdiction by filing a petition, bill, or complaint, or it may be jurisdiction in equity can be invoked for him, if he have a common interest with others, and some of them should sue for themselves and all others, including him. The bill in this case was filed, not only on behalf of plaintiffs by name, but on behalf of all others interested, of whom Merritt was one. In a sense, he was a party to the action. Indeed, a suit which is brought by some and not by all the parties having a common interest must be brought on behalf of all interested, or it would be demurrable for want of proper parties. Story, Eq. Pl. § 107. And such a bill binds the

rights and interests of the others. *Id.* § 128. The right of a few to sue for all existing, with power in the suit to bind the right and interest of all, it would not be unreasonable to contend, would give a jurisdiction which could be protected from an attempt to impair or defeat it by a subsequent suit by any of the parties interested, in another court. But this need not be insisted on. It was certainly open to Merritt to come into the action, and he filed a petition to intervene. By this, complainants contend, he appeared, and submitted to the jurisdiction of the court.

It is manifest, therefore, that, as no question involving the Constitution is "distinctly deducible from the record," the cause must be dismissed for want of jurisdiction.

THOS. H. HUBBARD,
WM. A. MAURY,
GEO. N. WILLIAMS,
ROBERT Y. HAYNE,
E. S. PILLSBURY,
Counsel for Appellees.

WASHINGTON, D. C., 1505 *Pa. Ave.*

No. 505.

Mot. of Britton & Browne for Leave

Filed Nov. 9, 1897.

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JAMES H. McKENNEY
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JAMES P. MERRITT ET AL., APPELLANTS,
v.
PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL.

No. 505

Appeal from the United States Circuit Court for the Northern District of California.

Now come the appellants, by their counsel, and respectfully move this honorable Court for leave to use on the present appeal the transcript of record now on the files of this Court, and on which this cause was docketed at the October term, 1896, supplemented by the additional matter relating to the present appeal.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Appellants.

STATEMENT.

This cause was docketed in this Court at the last term as No. 798 thereof, and the appeal was, on motion, dismissed on May 24, 1897. The Circuit Court has since allowed a second appeal, and bond has been duly given thereunder.

The transcript of the record as filed on the original appeal embraces more than three thousand pages and, counsel are informed, cost the appellants some $1,800 in its preparation. It is respectfully submitted that the use of this original transcript on this second appeal would obviate the useless expenditure of so large an amount of money in the mere duplication of the same transcript of record now upon the files of the Court. No one can possibly be prejudiced thereby, and the order desired would, in our understanding, be in entire harmony with the practice with respect to allowed petitions for certiorari, wherein the certified transcript submitted upon such petition is permitted to be used in the docketing of the cause on return to such writ. We also beg to suggest that this Court at the October term, 1895, on the motion of the undersigned, having dismissed the case of Rouse, Receiver, *v.* Hornsby, No. 706 of that term, on May 4, 1896, permitted counsel to present a petition for certiorari therein, and to use the transcript in No. 706, on submission of such petition.

Notice of this motion was duly served upon counsel for appellees on October 21, 1897, as appears by the proof thereof filed with the clerk.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Appellants.

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No. 505.

Affidavit for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Nov. 9, 1897.

No. 505

JAMES P. MERRITT ET AL., APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL.

Affidavit of George N. Williams in Opposition to Motion Respecting the Record on Appeal.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

George N. Williams, being duly sworn, deposes and says that he is and at all the times herein mentioned has been the solicitor for the complainants in the above-entitled cause; that said cause was pending in the circuit court of the United States for the ninth circuit and northern district of California for several years; that during said time there was much litigation over the question whether the said circuit court had jurisdiction of the cause; that upon said question much evidence was taken, said evidence being mainly to the point whether the complainants had not engaged in a collusive

attempt to impose on the jurisdiction of the court; that said evidence is now on file and a part of the record in the cause; that the said circuit court found that there was no such collusion and sustained the jurisdiction of the court; that the jurisdiction of the court was also attacked upon the ground that John A. Stanly and Stephen W. Purington, defendants to the original bill, were citizens of the State of California and were improperly joined as defendants for the purpose of conferring jurisdiction upon the court, and that their interest was generally with the plaintiffs, and that they should be arraigned and considered as plaintiffs for the purpose of determining the question of jurisdiction; and if they should be so arraigned there would be citizens of the State of California on each side of the cause; that the said circuit court held against said contention and sustained its jurisdiction; that thereafter a long hearing was had upon the merits of the cause, and that much evidence was taken upon said hearing, which evidence is now on file and a part of the record in the cause; that upon such hearing said court made and entered its final decree in favor of the complainants and against the defendants.

And this affiant further deposes and says that long after the term at which said final decree was made, entered, and enrolled the defendants James P. Merritt and Harry P. Merritt took an appeal to this honorable court; *that said appeal was solely upon the question whether the said circuit court had jurisdiction over said cause*, as will more fully appear from the assignments of error on said appeal, to which reference is hereby made; that long after the expiration of said term at which said final decree was made, entered, and enrolled the said appellants, James P. Merritt and Harry P. Merritt, obtained a certificate of jurisdiction from the Honorable Joseph McKenna, then judge of said court; that thereafter the complainants made a motion to dismiss said appeal upon the ground that no certificate of jurisdiction was obtained during the term at which the judgment was rendered; that the

record and moving papers upon said motion are now upon file in this honorable Court, and the complainants crave leave to refer to them and make them a part hereof; that said motion was duly submitted on the 10th day of May, 1897, and that on the 24th day of May, 1897, this honorable Court dismissed said appeal for want of jurisdiction, to which dismissal affiant respectfully refers.

That thereafter the said appellants, James P. Merritt and Harry P. Merritt, applied to said circuit court for an order allowing a second appeal; that said circuit court, against the objection and protest of the complainants, made an order allowing said second appeal; that said second appeal was allowed *upon the ground that a constitutional question was involved in said case;* that *the hearing of the application for the allowance of said second appeal was the first time that it was ever urged or contended in said cause that any constitutional question was involved, and that the only ground upon which it was attempted to be supported was in substance and effect that inasmuch as the jurisdiction of the court depended ultimately upon the provisions of the Constitution of the United States, therefore a constitutional question was involved*—in other words, so far as affiant understands the argument made upon said occasion, every question of Federal jurisdiction necessarily involves a constitutional question, and in this regard affiant respectfully refers to the petition and assignments of error of said James P. Merritt and Henry P. Merritt upon said second appeal and craves that they be considered upon the hearing of this motion.

And affiant further deposes and says that the papers referred to in the notice of motion upon which this affidavit is filed, to wit, the notice of motion on behalf of said James P. Merritt and Harry P. Merritt, dated October 21, 1897, and noticed for Monday, the 8th day of November, 1897, *have not been served upon affiant as solicitor for complainants or upon any of the counsel for complainants;* that the portion of the transcript of the record on file in the clerk's office of

said supreme court on said first appeal was not served with said notice of motion or upon affiant as solicitor, as aforesaid, or upon any of the complainants' counsel, and that no copy of the transcript of the additional record mentioned in said notice of motion has ever been served upon affiant or upon any of the counsel for the complainants in said cause.

And this affiant further deposes and says upon information and belief that the certified transcript of the portion of the record in said cause filed by the said appellants with the clerk of this Court as the record of the first appeal to said suit in said supreme court is, in the opinion of this affiant, *utterly and entirely insufficient as a record on said second appeal in said cause;* that, in the first place, the ground upon which said appeal was allowed, and the only ground upon which it can be pretended that this Court has jurisdiction, is *that a constitutional question is involved upon said appeal,* and that, *as affiant is informed and believes, such an appeal, if valid, takes up the whole case to this honorable Court,* and that consequently it is necessary that the whole record should be before this Court on said appeal; and affiant further deposes and says upon his information and belief that the portion of the record filed on said former appeal and referred to in said notice of motion is not even sufficient to present the question of jurisdiction of the said circuit court over said cause.

And affiant further deposes and says upon his information and belief that the additional record referred to in said notice of motion consists merely of the papers upon the application for allowance of said second appeal, and that neither of said portions of the record referred to in said notice of motion nor both together are sufficient to properly present to this Court either the said question of jurisdiction or the questions arising upon said second appeal, if the same shall be considered to be properly taken.

And affiant respectfully protests and objects to the granting of said motion or to the substitution of any partial or in-

complete record upon the appeal in said cause, but requests that this Court require the record provided by law to be produced before it; and affiant is authorized to state that all of the counsel for complainants join with him in this protest, objection, and request.

And affiant respectfully states to this Court that in his opinion and in the opinion of all of the counsel for the complainants in said cause the said second appeal is nothing more than an attempt on the part of the said appellants to obtain what is practically a rehearing of the question disposed of by this honorable Court in its order dismissing said first appeal; and affiant humbly prays that if this Court shall consider that such is the case it will deal with the appeal of said appellants as justice shall seem to require.

GEO. N. WILLIAMS.

Subscribed and sworn to before me this 1st day of November, 1897.

[SEAL.] A. J. HENRY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] United States Supreme Court. The President and Trustees of Bowdoin College *et al.*, appellees, *vs.* James P. Merritt *et als.*, appellants. Affidavit of George N. Williams in opposition to motion respecting the record on appeal.

Supreme Court of the United States.

OCTOBER TERM, 1897.

JAMES P. MERRITT AND HENRY P. MERRITT,
APPELLANTS,

v.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE AND OTHERS.

No. 505.

Appeal from the Circuit Court of the United States for the Northern District of California.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

I.

This is a general appeal allowed by the Circuit Court. Appellee prints only the assignment of errors and thereon prays dismissal. But such assignment distinctly asserts that the case presents and involves the "construction or "application" of the Federal Constitution—Article III, which extends the judicial power to controversies "be- "tween citizens of different States," and that the true construction and application of such provision excludes

this case therefrom, as will appear from the bill and other pleadings, and the evidence as found in the record. Errors 1–18.

The question thus presented can only be properly heard and determined on inspection of the record or such relevant portions thereof as the appellants must print, and with fair opportunity for argument therefrom.

Manifestly allowance of such general appeal and distinct assertion of the existence of such constitutional questions does not justify dismissal on a mere brief of counsel which refers the Court to sundry opinions of the Circuit Court, and *assumes* the case presented by such appeal.

When all questions involving the construction or application of the Constitution are by existing law left to this Court as the sole reviewing tribunal, litigants should not be thus summarily dismissed, and upon the mere assumption that errors so broadly assigned and presented in a case of this magnitude and importance are without *any* foundation. The appeal is given by law as matter of *right*, and has been so allowed by the Court below. Hearing as matter of right is equally contemplated by the law and is not properly to be limited solely to a brief in support of or in opposition to a motion to dismiss, without a single page of the record made in the Court below spread before the Court for its inspection or information, and in a case where a large part of a voluminous record is essential to be so printed and presented in the proper determination of the questions involved in the appeal.

II.

Some of the errors assigned, Nos. 19–25, assert that by the pleadings and evidence it is shown that named parties

were improperly made defendants when properly complainants, and that this was done to create an apparent case of diverse citizenship cognizable in a Federal Court. And ignoring the specific preceding 18 errors assigned, wherein it is distinctly alleged that, as appears by the bill and the pleadings and evidence, the suit involved the construction and application of that provision of the Constitution which provides that the Federal judicial power shall extend to controversies between citizens of different States, counsel plant their *entire* argument on the assigned errors 19–25, and assume these to present the entire case, although no part of the record is presented whereby to determine the correctness or incorrectness of that assumption.

III.

By the Constitution, Art. III, Federal judicial power extends "to controversies," *inter alia*, "between citizens "of different States." Exercise thereof is vested in one Supreme Court and such inferior Courts as Congress may establish. The distribution of the power (except in cases of original cognizance in this Court) rests in legislative control, but the power *itself* is limited to the cases and controversies expressly defined in the Constitution. It cannot be enlarged by legislation. The limitation is always present, and is fundamental.

Though the Constitution does not in terms extend the judicial power to all controversies between two or more States, yet it in terms excludes none, whatever may be their nature or subject. It is therefore a question of construction whether the controversy in a given case is within the grant of judicial power..

Rhode Island v. *Massachusetts*, 12 Pet. 657, 721.

As this is true of States, it must be equally true of individuals. The language of the Constitution in respect to *each* grant of judicial power—States or individuals—is identical.

But the Act of March 3, 1891 (26 Stats. 826, Sec. 5), extends to this Court the power of review by appeal or writ of error from the Circuit Court "in any case that "involves the construction or application of the Constitu- "tion of the United States." This provision is manifestly broader in scope and meaning than the word "construc- "tion" alone. It was inserted *ex industria*, and the word "application" must be extended to cases not involving the "construction" of the Constitution, for the disjunctive "or" has not here the same meaning as the conjunctive "and."

What is its meaning?

The distinction is manifest. Cases involve the "con- "struction" of the Constitution when some provision of that instrument itself is presented for *interpretation*. Other and distinct cases involve the "application" of the Constitution upon some provision of that instrument whose interpretation or construction is not presented or in doubt, or has been judicially settled. The inquiry then extends only to the "application" of such pre-determined provision to the case in hand.

To illustrate. If by decision of this Court some provision of the Constitution is *construed*, and its meaning thereby determined, the effect of *that* provision where pleaded in a subsequent case extends to the determination of its "application" or "non-application" to such case. *Such* a case is within the clear appellate jurisdiction of this Court under the Act of 1891.

To illustrate by the case at bar.

The judicial power is extended by the Constitution to

" controversies" * * * " between citizens of different " States." The question may arise, " What is a contro- " versy?" and its determination would involve " construc- " tion " of the Constitution. That being determined, some other and later case may involve the " application " of this settled provision to the facts and circumstances of *that* case, whereby it would be determined that it was or was not a case of Federal cognizance.

Again, and as the record in this case will disclose, certain parties hold title as mere *trustees* The beneficiaries thereunder are named in the instru nts of trust; they appear as actors in the litigation. s the question of diverse citizenship under such record conditions to be determined by the citizenshipof trustees or beneficiaries in upholding or denying the jurisdiction of a Federal Court? This may involve both " construction " and " application " of the Federal Constitution. Can these questions be determined solely on counsel's brief on a motion to dismiss as is here asked? The determination of *such* questions involve the highest elements of jurisdiction conferred upon this tribunal of last resort. Manifestly such weighty matters cannot be " whistled down the wind " in the absence of the record, and in face of a general appeal allowed on full hearing by a Federal judge.

IV.

Counsel err in assuming that because the Circuit Court derive their jurisdiction *immediately* from acts of the Congress such acts *alone* measure and define the extent of their powers and jurisdiction. That is true in all cases where parties or subject-matter are within the jurisdiction so conferred. But it is equally true that where existence of parties or subject-matter is *denied*, whereon alone the

statute can operate, resort must be had to the origin of all Federal judicial power—the Constitution itself. That is the ground of appeal in present case. In all the cases cited there was no *denial* of diverse citizenship; the point made was that the party claiming the right to sue in a Federal Court because of diverse citizenship or otherwise did not possess the *right*—as, for instance, that as the holder of a promissory note or chose in action *he* could not so sue, because his assignor did not possess such diverse citizenship, or that the transfer was not *bona fide* and the Federal *statute* did not therefore confer the right on the assignee, &c. Manifestly the cases cited do not here apply, because while diverse citizenship is not here denied, yet a ground of appeal *inter alia* is that, as shown by the pleadings and proof, there is no *controversy* between citizens of different States whereby any Federal judicial power can be lawfully exercised. The distinction is obvious and controlling.

V.

The assumption of counsel in entire absence of the printed record that the *only* question on this appeal is one of statutory jurisdiction under claim of diverse citizenship is followed by the suggestion that any jurisdiction so exercised here, on pending appeal, would be in derogation of the power of *final* review vested in the Circuit Courts of Appeals in all cases in which the jurisdiction is dependent "*entirely* upon the opposite "parties to the suit or controversy being aliens and "citizens of the United States or citizens of different "States."

But in this we think counsel are clearly in error. The jurisdiction of the Circuit Court of Appeals is upon the

merits alone, and in a case where the jurisdiction of the Circuit Court is *unchallenged* because of diverse citizenship. All questions of *jurisdiction* of the Circuit Court are reviewable only in *this* Court. Such is the language and intention of the Act of 1891, and it is so applied.

United States v. *Jahn*, 155 U. S. 109, 115.

Furthermore, the operation of that provision of the Act of 1891 which gives an appeal or writ of error to *this* Court in cases involving the jurisdiction of the Circuit Court is *not* the exclusive manner in which jurisdictional questions may here arise. There are many cases wherein by defective service of process or other questions of mere practice or non-existence of jurisdictional amount in controversy the jurisdiction of the Circuit Court is challenged, as illustrated by the case of—

Mexican Central Ry v. *Pinckney*, 149 U. S. 194.

In *such* cases the jurisdiction here can and does well depend solely on proper certification of the question from the Circuit Court. They are the precise *class* of cases wherein the jurisdiction of the Court below must be tested by statute—either the Act of Congress creating or defining the powers of the Court, or the application of the provisions of State law and practice. *But they are not exclusive.* Other cases can and do arise wherein the "construction or application" of the Constitution is directly involved as the primary source of *any* jurisdiction and the foundation for the exercise or non-exercise of any Federal judiciary powers. In *such* cases the jurisdiction here is invoked by general appeal, precisely as in the case at bar. The questions which may and do arise in such instances are not measured by certificates, but stand upon the *record*, to which the Court must have necessary and

full access to fully and properly hear and determine such appeal.

VI.

Chappell v. *United States*, 166 U. S. 499, is in point, and is conclusive on pending motion. That was a condemnation proceeding brought in an U. S. District Court. The *defendant*, by exception to the inquisition, urged (1) that the statute under which the proceeding was brought was unconstitutional; (2) the officer bringing the same was without authority so to do; and (3) the Court was without jurisdiction over the subject-matter. Thereon the Court held:

"But no question of jurisdiction having been sepa-
" rately certified or specified, and the writ of error hav-
" ing been allowed without restriction or qualification,
" this Court, under the other clause of the statute above
" cited, has appellate jurisdiction of this case as one in
" which the constitutionality of a law of the United States
" was drawn in question; and, having acquired jurisdic-
" tion under this clause, has the power to dispose not
" only of the constitutional question, but of the entire
" case, including all questions whether of jurisdiction or
" of merits."

And which the Court proceeded to do.

The same rule is affirmed in—

Homer v. *U. S.*, 143 U. S. 570.

Scott v. *McDonald*, 165 U. S. 58, 71.

So the present appeal in the case at bar has been allowed "without restriction or qualification," and the assignment of errors avers that by the bill, pleadings an evidence a question involving the "construction or appli-
" cation" of the Federal Constitution is raised. On *that*

question appellants should as of right enjoy the opportunity to be heard upon the *record*, and not upon a brief in support of a motion to dismiss their appeal.

The case of *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430, is cited as if conclusive in sustaining present motion. We submit it has no such effect.

There the plaintiff in the Circuit Court sought review in this Court of adverse judgment there rendered, his only ground of Federal jurisdiction affirmatively set up by him *or appearing in the case* being diverse citizenship. But the case does *not* hold that the "construction or applica-"tion" of the Constitution must be there raised by plaintiff *alone* in order to vest this Court with jurisdiction to hear and determine on appeal. *Contra* the opinion cites the former case of *Ansbro* v. *United States*, 159 U. S. 695, and *Green* v. *Cornell*, 163 U. S. 75, in which the *reverse* of that assumption is distinctly ruled.

Thus Ansbro as *defendant* brought the case here by writ of error, and after argument and examination of the whole record, this Court said (p. 697):

"A case may be said to involve the construction or ap-"plication of the Constitution of the United States "when a title, right, privilege or immunity is claimed "under that instrument, but a definite issue in respect of "the possession of the right must be distinctly deducible "*from the record* before the judgment of the Court below "can be revised on the ground of error in the disposal of "such a claim by its decision. And it is only when the "constitutionality of a law of the United States is drawn "in question, not incidentally, but necessarily and directly, "that our jurisdiction can be invoked for that reason. "*Borgmeyer* v. *Idler*, 159 U. S. 408; *Carey* v. *Railway* "*Company*, 150 U. S. 170; *In re Lennon*, 150 U. S. 395; "*Northern Pacific Railroad Company* v. *Amato*, 144 U. "S. 465, 472; *Sayward* v. *Denny*, 158 U. S. 180. An as-

" signment of errors cannot be availed of to import ques-
" tions into a cause which the record does not show were
" raised in the Court below, and rulings asked thereon, so
" as to give jurisdiction to this Court under the fifth sec-
" tion of the act of March 3, 1891."

So in the case of *Cornell* v. *Green*, 163 U. S. 75, likewise fully argued to and considered by the Court on the whole record, the Opinion at p. 79 recites :

" The Constitution of the United States is not men-
" tioned in the bill of Cornell, *or in the demurrer of the*
" *defendant*, or in the decree and opinion of the Court.
" The case appears to have been treated throughout as
" depending upon a question of chancery practice, not of
" constitutional right. The first indication of anything
" like an intention on the part of the plaintiff to invoke
" the protection of the Constitution of the United States
" is in the suggestion, in the assignment of errors, ' that
" ' said finding deprived said complainant of his property
" ' without due process of law.' "

And the opinion then concludes by giving the quotation, *supra*, from the case of *Ansbro* v. *United States*.

See also—

Chicago, Burlington &c. Rd. v. *Chicago*, 166 U. S. 226, 231.

And in all the cases cited it is significant to note that the Court heard and decided the question from the *record*, and after full argument. These appellants ask the same right, while opposing counsel ask dismissal upon their mere brief, without laying before the Court a single page of the record on which this appeal has been " allowed " without restriction or qualification." *Chappell* v. *United States, supra.*

When the record in this cause is properly laid before

the Court it will abundantly verify the correctness of the assignment of errors in showing that the question of the "construction or application" of the Federal Constitution in respect to "controversies" "between citizens of different States" was properly and distinctly raised thereby, and was so understood and expressly ruled upon as such by the Circuit Court. It is therefore directly involved by the pending appeal.

If appellants are, on proper hearing upon the *record*, able to sustain their views of the question thus involved, this Court has repeatedly declared its duty in respect to both its action and that of the Circuit Court.

Morris v. *Gilmer*, 129 U. S. 315, 325.
Chapman v. *Barney*, ib. 677, 681.
Peper v. *Fordyce*, 119 U. S. 469, 471.

And the duty of the Circuit Court to so ascertain and determine its powers *without* suggestion or plea is equally well settled.

Morris v. *Gilmer*, *supra*, 326.
Blacklock v. *Small*, 127 U. S. 96, 105.

VII.

Reference is made by counsel to a former appeal herein dismissed at the last term because of a defective certificate. That appeal was based upon certificate only—and was addressed to the special point of jurisdiction covered thereby. It has been dismissed. Such dismissal is not a bar, and does not preclude consideration of the pending general appeal "allowed without restriction or qualification," and on which the appellants ask the right to be heard and as the law of the land provides. No conclusion

or argument to appellants' prejudice can be drawn from the dismissal of the former appeal.

Such appeal did not raise the proposition covered by the pending appeal, and the dismissal of the former appeal must be governed solely by the reasons given therefor.

Davidson v. *New Orleans*, 96 U. S. 104.
Schunk v. *Moline & Co.*, 147 U. S. 503.
Horner v. *U. S.*, 143 U. S. 577.
Scott v. *McDonald*, 165 U. S. 71, 73.

We submit, appellants are entitled to be heard *on the record*, in support of their general appeal, and that the motion to dismiss should be denied.

Respectfully submitted

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Appellants.

ADDENDA.

As inspection of the record will show, the existence of a controversy "between citizens of different States" was strenuously denied in the Circuit Court and was expressly ruled. This contention must be determined by and from the Federal Constitution. The statute conferring jurisdiction upon the Circuit Courts in controversies "between "citizens of different States" simply repeats the language of the Constitution. Hence, and as *distribution* of federal judicial power by the statute is not here involved, but the fundamental construction or application of the Constitution as the source and foundation of *any* jurisdiction herein, the general appeal in this case is not to be tested or determined by the construction of the statute nor controlled by decisions which relate solely to such statute law.

The pleadings, the evidence, and the *law* properly place the beneficiaries designated in the caption of the bill and the trustees (as well as the California beneficiaries in the body of the bill) on one side and the appellants on the other side of the *real* controversy—"arranging the "parties on opposite sides of the real and substantial "dispute," as held in *Blake* v. *McKim*, 103 U. S. 336, 337. So arranged, it is by this record demonstrated that there is no controversy "between citizens of different States," whereby, under the Constitutional grant of federal judicial power, this suit can be heard and determined in a federal Court.

Pacific R.R. v. *Ketchum*, 101 U. S. 289, 299.

And in so doing the Court is but engaged in the continuous duty of determining and applying the fundamental federal law.

Davidson v. *New Orleans*, 96 U. S. 97, 104.

And this duty and this question necessarily involve review in this Court of all the pleadings and the evidence with respect thereto—in short, the *entire* record as far as pertinent. The interests of parties—real and nominal; the consideration of the effect and weight of the testimony thereon, and the application of legal rules thereto, all of which are for the determination of this Court on this appeal, irrespective of the conclusions of the Circuit Court upon either facts or law.

None of these matters are limited or controlled by the federal statute. Congress may distribute but cannot *create* judicial power. That is measured and limited by the Constitution alone, and resort to that instrument in final determination of *this* case is the ground of pending appeal.

To repeat: We insist that the Constitutional judicial power over controversies "between citizens of different "States" does not apply to *this* case, because the citizenship of the trustees, who are shown by the record to have originated and are now maintaining this suit in the names of the complainants, as well as some of the beneficiaries under the trusts, are citizens of the same State (California) as are the adverse defendants and appellants. Such trustees, under the facts disclosed by this record, are indispensable parties.

Peper v. *Fordyce*, 119 U. S. 469.

Kerrison v. *Stewart et al.*, 93 U. S. 155.

The record will further show that appellant, Henry P. Merritt, was not brought into the Circuit Court or made a party to this suit until he had begun an action in the State Superior Court, and then only for the purpose of enjoining such action. His right to maintain that action is secured by the Tenth Amendment of the Federal Con-

stitution. He invoked in vain in the Court below both the "construction or application" of Article III, and the protection given by the Tenth Amendment.

The right of appeal is favored. It is granted in all cases by Article III of the Constitution to *this* Court, with such exceptions only as Congress may prescribe. The legislative exceptions thus authorized should be strictly construed on grounds of public policy and the accepted canons of interpretation, for they obviously stand in derogation of the *general* right so conferred by the Constitution.

No. 505.

Affidavit for Appellants.

Filed Nov. 9, 1897.

Office Supreme Court
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JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JAMES P. MERRITT ET AL.,
APPELLANTS,
v.
PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL.

No. 505

Appeal from the United States Circuit Court for the Northern District of California.

REPLY TO AFFIDAVIT OF GEORGE N. WILLIAMS IN OPPOSITION TO MOTION RESPECTING THE RECORD ON APPEAL.

1. Service of pending motion was made on opposing counsel on October 21, 1897. Proof thereof is on file with the Clerk. The *supplemental record* has not been served upon counsel nor was such service necessary. The notice fully informed counsel precisely what was to be asked and the record to be filed. It has been so filed.

2. The primary purpose of the affidavit is to suggest to

the Court that the pending appeal is in the view of opposing counsel without merit. *But* the Circuit Judge has allowed the appeal after appellees were fully heard in opposition. An important and substantial ground of appeal unconstitutional is presented. When the case is properly docketed, motion to dismiss is the proper and immediate course open to counsel whereon we should of right submit full printed argument. Obviously, the present effort to prevent consideration of appellants' appeal *at all* is neither proper nor just.

3. The transcript on the original appeal is contained in six volumes, embracing over 3,000 pages, and is certified by the Clerk on March 27, 1897, as a *full* copy of the entire record in the cause. The Clerk's certificate to the supplemental transcript now presented recites that it is a full transcript of all the record and proceedings in said cause transpiring *since* March 27, 1897. The Court has thus before it the *whole* record, as inspection of the Clerk's certificates will fully demonstrate.

4. The undersigned counsel believe that the Court will not and need not burden appellants with the great and unnecessary cost of merely *duplicating* the entire record now upon the files of the Court. The motion now presented is made in good faith to obviate that wholly unnecessary expense and burden. If the end desired should be attained by motion for leave to withdraw the original transcript in order to permit same to be recertified by the Clerk below, as on the present appeal, or for certiorari, whereon the Clerk below can make obvious return that the record so called for is *now* on the files of this Court, or any other procedure, is requisite to maintain technical compliance with proper *method* of reaching the end desired, counsel respectfully ask that such order may be entered. Obviously, whilst *form* is important, *substance*

should control, and the wisdom of the Court can readily supply the ignorance of counsel who freely admit that in making this plain, direct, but well-understood motion, they may easily have failed to anticipate the exact *form* most acceptable to the Court. The power of the Court must be conceded; its fair and just exercise is alone invoked. The *entire* record is here; opposing counsel insist that it must be brought here *again* by a complete new transcript, and these appellants burdened with great and unnecessary expense therefor. *Cui bono?*

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Appellants.

MERRITT v. BOWDOIN COLLEGE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 505. Submitted January 31, 1898. — Decided March 14, 1898.

An appeal does not lie to this court from the decision of a Circuit Court in which, after overruling, on the facts, a plea by the defendant that the action was not in truth a controversy between citizens of different States, but solely between citizens of one State, to whom other parties were collusively added for the purpose of giving the Circuit Court jurisdiction, the court then rendered a final judgment in favor of the plaintiffs on the merits.

While such an issue involves the jurisdiction of the Circuit Court, it does not involve or require, within the meaning of the act of March 3, 1891, c. 517, either the construction or application of the Constitution.

THE plaintiffs in this suit, appellees here, are the President and Trustees of Bowdoin College, a corporation of Maine, and a large number of individuals who are citizens of States other than California. They sued on behalf of themselves and of all other beneficiaries under a certain deed of trust made and entered into between Catharine M. Garcelon, of the first part, and John A. Stanly and Stephen W. Purington, trustees, of the second part. The defendants were James P. Merritt and others, including Stanly and Purington. The general object of the suit was to quiet the title of the plaintiffs to the real estate conveyed by the above deed to Stanly and Purington, and to secure an injunction restraining the other defendants from violating certain alleged covenants, promises and agreements made with the grantor, and also the specific performance of such covenants, promises and agreements.

The bill contained these allegations as explanatory of the reasons why the suit was not instituted by the trustees Stanly and Purington:

"Your orators and oratrices allege and aver that they have requested the said Stephen W. Purington and John A. Stanly, as trustees as aforesaid, to institute such action, suit or proceedings against the defendants, the said James P. Merritt

and Frederick A. Merritt, and their confederates, as would be necessary to quiet their title to the real estate so conveyed to them in trust as aforesaid, or to secure a perpetual injunction restraining the said James P. Merritt and Frederick A. Merritt and each of them from violating their repeated covenants, promises and agreements made with the said Catharine M. Garcelon, as is hereinbefore stated, and to secure a specific performance of said covenants, promises and agreements, and the said Purington and Stanly have declined to accede to this request of your orators and oratrices; that by reason of such refusal your orators and oratrices are compelled to institute this suit, which your orators and oratrices do, not only in their own behalf, but on behalf of all other beneficiaries of said trust who may elect to join your orators and oratrices herein."

The defendants James P. Merritt and Frederick A. Merritt demurred to the bill of complaint, assigning as grounds of demurrer that it appeared from the bill that the plaintiffs were not entitled to the relief prayed against them; had not by the bill made out any title to the relief prayed; that the subject of the suit was not within the jurisdiction of a court of equity; that the court below had no jurisdiction of the suit; that it appeared from the bill that the same was exhibited against the defendants for several distinct and independent matters having no relation to each other or to one another, and in which or in the greater part of which the defendants demurring were not in any way interested or concerned; that the bill was multifarious; that it appeared from the bill that certain persons were not brought before the court who were necessary and proper parties; and that the bill did not show any matter of equity entitling the plaintiffs to the relief asked against the defendants who demurred.

The demurrer was overruled, and the opinion of the court thereon will be found in 54 Fed. Rep. 55.

The case was next heard on the application of the plaintiffs to file a supplemental bill making Harry P. Merritt a party defendant, and for an injunction to restrain the prosecution of an action commenced by him in the Superior Court of Alameda

County, California. Leave to file such a bill was given, and a preliminary injunction was granted. 59 Fed. Rep. 6.

Subsequently the defendant James P. Merritt filed a plea, in which it was stated that all the defendants to the bill (including the defendant Purington who had then recently died) were at the time of the commencement of the action and ever since had been citizens of California; that Stanly and Purington "could not at any time bring or maintain in this court this action nor any cause of action alleged in the said bill of complaint; that said last-named defendants for the purpose of bringing and maintaining this action in this court, and to evade the provisions of the Constitution of the United States and the laws giving jurisdiction to this court, brought and maintained this action in the names of the persons named in said bill of complaint as complainants therein, and without any authority thereto by or from said named complainants or any of them; that said named complainants are only nominal parties to said bill of complaint and in this action, and that said last-named defendants John A. Stanly and Stephen W. Purington, claiming to be trustees as aforesaid, have always been in truth and in fact the only real parties conplainant in said bill of complaint and in this action, and that they are only nominally and colorably defendants in said bill and in this action;" that "the said John A. Stanly and Stephen W. Purington, claiming to be trustees as aforesaid, never were, nor was either of them at any time, nor is the said John A. Stanly, as trustee or otherwise, now in truth or in fact, real or genuine parties defendant or a real or genuine party defendant to said bill of complaint; and that said John A. Stanly and Stephen W. Purington, claiming to be trustees as aforesaid, were, and each of them is named in said bill of complaint as a party defendant thereto only colorably and by false pretense, for the purpose of making it falsely to appear that he is a party defendant thereto and in truth the real and genuine party complainant therein; that none of the parties named in said bill as complainants therein ever was or is in truth or in fact complainants or a party complainant to said bill of complaint or in this action."

The plea further averred —

"That the persons named in said bill of complaint as complainants never did, and that none of said persons ever did, in truth or in fact or in good faith, request the said Stephen W. Purington and John A. Stanly, claiming to be the trustees aforesaid, or in any capacity, or either of them, to institute any suit, action or proceeding against the defendants, the said James P. Merritt and Frederick A. Merritt, or either of them, or any person or persons whatever, to quiet the title to real estate, or any part thereof, alleged in the said bill of complaint to have been conveyed to said Stephen W. Purington and John A. Stanly in trust, or to secure an injunction restraining the said James P. Merritt and Frederick A. Merritt, or either of them, from violating what is alleged in said bill of complaint to be their covenants, promises and agreements, alleged in said bill to have been made by them with Catharine M. Garcelon, or from violating any of said alleged covenants, promises or agreements, or to secure a specific performance of said alleged covenants, promises or agreements or any of them, or any action, suit or proceeding whatever; that said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, or in any capacity, never in truth or in fact or in good faith declined or refused to bring such or any action; that if the persons or any of them named in said bill of complaint as complainants therein ever did request said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, or either of them, to institute any action, suit or proceeding whatever, or if they or either of them ever declined or refused so to do, such request and such declination were not and each of them was not made honestly or in good faith, but at the fraudulent instance and request of said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, and solely to enable said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, to feign and falsely pretend to refuse such request, and thereupon to institute falsely fraudulently and prosecute in this court this action against this defendant.

"That in truth and in fact said bill of complaint was prepared and filed in this court by said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, and

Counsel for Parties.

by them only, and the same and this action has ever since been and is now being prosecuted by them only. . . .

"That this action is not in truth or in fact a controversy between citizens of different States. That this action is in truth and in a fact a controversy solely between citizens of the State of California, that is to say, until the death of said Stephen W. Purington, between the said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, citizens of the State of California, and since his death, by said John A. Stanly, claiming to be such trustee, on the one side, and the said Frederick A. Merritt and this defendant on the other side. That this court has no jurisdiction of the said bill of complaint and no jurisdiction of this cause."

The cause was heard on a motion of the defendant James P. Merritt to dismiss the suit as a collusive one within the meaning of section five of the act of March 3, 1875. It was adjudged that the plea in abatement was not sustained by the evidence, and the motion to dismiss was consequently overruled. 63 Fed. Rep. 213. A final decree in favor of the plaintiffs was entered June 18, 1896. From that decree an appeal was prosecuted directly to this court. But on the 24th of May, 1897, the appeal was dismissed upon the authority of *Colvin* v. *Jacksonville*, 158 U. S. 456; *The Bayonne*, 159 U. S. 687, 692; and *Chappell* v. *United States*, 160 U. S. 499, 507, 508. *Merritt* v. *President & Trustees of Bowdoin College*, 167 U. S. 745. In the first of the cases cited it was adjudged that when a case is brought here directly from a Circuit Court of the United States upon the ground that it involves the jurisdiction of that court, the certificate as to jurisdiction must be granted during the term at which the judgment or decree is entered. The present appeal was taken on the 17th of June, 1897, and the case is before the court on a motion of appellees to dismiss the same for want of jurisdiction in this court.

Mr. William A. Maury, *Mr. Thomas H. Hubbard*, *Mr. George N. Williams*, *Mr. Robert Y. Hayne* and *Mr. E. S. Pillsbury* for the motion.

Mr. A. T. Britton, *Mr. A. B. Browne*, opposing.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

The object of the plea in abatement was to bring about a dismissal of the suit under the fifth section of the act of March 3, 1875, c. 137, 18 Stat. 470. That section provides for the dismissal of a suit in a Circuit Court of the United States if it shall appear to the satisfaction of the court at any time that the parties to it "have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act."

By the act of March 3, 1891, c. 517, 26 Stat. 826, appeals or writs of error may be taken from the District Courts or the Circuit Courts directly to this court in certain cases, among which are cases in which the "jurisdiction of the court is in issue," and cases that involve "the construction or application of the Constitution of the United States." The former appeal was dismissed upon the ground that a direct appeal to this court would not lie on an issue as to the jurisdiction of the Circuit Court unless the question of jurisdiction was certified during the term at which the final decree was rendered.

It is now sought to bring the case here by appeal directly from the Circuit Court upon the ground that it involves the "construction or application of the Constitution of the United States." This position cannot be sustained. When it appears that parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act of 1875, then the Circuit Court is, within the meaning of the act of 1891, without jurisdiction to proceed. But the plea in this case raised no question as to the constitutionality of the act of 1875, and called for no order or judgment that would require a construction or application of the Constitution, although an allowance of the plea may have involved the application of an act of Congress. The plea set out certain facts which, if found to be true, required the dismissal of the suit as one of which the court could not take cognizance under the statute regulating the jurisdiction of the Circuit Courts of

the United States. While the issue involved the jurisdiction of the Circuit Court, it did not involve or require, within the meaning of the act of March 3, 1891, either the construction or application of the Constitution.

For the reasons stated, the motion to dismiss the present appeal is sustained, and the appeal is

Dismissed.

The CHIEF JUSTICE did not sit in this case nor participate in its decision.